GALIFT (M) SDN. BHD. v. TAY KENG LOCK

INDUSTRIAL COURT, KUALA LUMPUR
CHAIRMAN: TAN KIM SIONG
CASE NO. 4/4-251/92 (13 JULY 1992)
3 AUGUST 1993

PRELIMINARY OBJECTION *- Allegations not contained in Letter of Termination set out in Statement in Reply - Application to strike out - Whether a Statutory Declaration may be admitted to form part of the record and proceedings of the Court - r10(3),r21A Industrial Court Rules 1967.*

The Claimant Tay was dismissed from his position as Marketing Manager with the Company Galift(M) S/B by letter dated 4 January 1992 which referred to the discussions held with the Claimant on 2 and 4 January 1992 on his performance in the Company.

On the day set for hearing of the Claimant's case for unfair dismissal, his Counsel raised a preliminary objection as to paragraphs 4 and 5 of the Company's Statement in Reply which expounded several acts of misconduct such as the making of secret profits and habitual insolence to his superior as further grounds for the termination. Counsel argued that the sole reason stated in the Letter of Termination related to the Claimant's performance and the employer cannot adduce reasons not stated in the said letter nor can the Court look at or inquire into reasons in the Statement in Reply which were not mentioned in the Letter of Termination.

The Company countered the objection by relying on Rule 10(3) of the Industrial Court Rules 1967 (ICR) which states:

Such Statement in Reply shall be confined to the matters raised in the Statement of Case and to any issues which are included in the case referred to the Court by the Minister or in the matter required to be determined by the Court under the provisions of the Act and which may have been omitted from the Statement of Case and shall contain:

i) a statement of all relevant facts and arguments; ...

It explained that paragraphs 4 and 5 of the Reply were answers or replies to the Claimant's allegations in the Statement of Case that his dismissal was without just cause or excuse (para 4) and contrary to the priciples of natural justice (para 5). The Company further contended that the word 'performance' was wide enough to connote misconduct (L.B.Curzon's Dictionary of Law).

The Claimant raised a second objection as to the admissibility of a statutory declaration by a Company witness contending that the Rules make no provision for the admission of such a document to form part of the evidence/proceedings of a case.

Held:

[1] The case of Raman a/l Perumal Thever v. National Land Finance Co-operative Society Ltd. and Industrial Court Malaysia, Usul Pemula No.R8-25-121-1990 (the Society) is pertinent to the issue of the first objection by the Claimant. The learned High Court judge had held that the Court is confined to the reasons enumerated in the Letter of Termination and may not inquire into other grounds subsequently raised by the employer to justify the dismissal. However, upon the matter being appealed before the Supreme Court, the High Court decision was reversed. The Industrial Court is therefore bound by the ruling of the Supreme Court which allows the adjudicating Court to look into other reasons subsequently raised by an employer in justifying a dismissal. As such the application to strike off the grounds relating to misconduct is disallowed.

As regards the word 'performance' bearing connotations with the word misconduct, the Court regards this interpretation as unacceptable.

[2] With reference to the second objection, while there is provision to admit an affidavit as evidence (r21A), none exists to admit a statutory declaration. The application to exclude this document to form part of [Orders accordingly]

Counsel:

For the Company - Steven Wong; M/s. Ariffin & Partners

For the Claimant - B. Lobo; M/s. Lobo & Associates

AWARD NO. 244 OF 1993 [3 AUGUST 1993]

AWARD

The parties to the dispute are Galift (M) Sdn. Bhd. (hereinafter referred to as "the Company") and Tay Keng Lock (hereinafter referred to as "the Claimant") who joined the services of the Company on 1 February 1991.

The dispute is over the dismissal of the Claimant from the services of the Company as its Marketing Manager. The Claimant's last drawn salary was RM3,550 per month. The Claimant was also entitled to a Company maintained car.

By letter dated 4 January 1992 the Company summarily dismissed the Claimant from its services with effect from the same date.

The Claimant contends at the hearing that the said dismissal is without any just cause or excuse and is contrary to the principles of natural justice and an unfair labour practice.

In its Statement in Reply the Company denies that it had dismissed the Claimant without just cause or excuse and contends that the Claimant was guilty of misconduct and included in the Reply a detailed particulars of misconduct alleged against him.

At the outset of the hearing this morning counsel for the Claimant raised a preliminary objection. It was contended that paragraphs 4 and 5 of the Statement in Reply should be struck off in view of the letter of termination. Similarly the Court should not admit the Statutory Declaration declared by one Khong Siew Lee.

The disputed paragraphs are as follows:

In the course of his employment under the agreement and before the alleged breach the Claimant was guilty of misconduct in his employment within and outside the premises of the Company.

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i) by making secret profits and/or otherwise misusing the funds of the Company, and/or appropriating the funds of the Company to his own benefit; ii) by wilfully disobeying the lawful and reasonable orders of the Company's Managing Director in the course of the employment; iii) breach of trust/fiduciary duty; iv) by habitually neglecting his duties; v) by failing to perform his duties with due care and attention; vi) by being habitually insolent to the Company's. Managing Director in the course of the employment; vii) by making dishonest claims on monthly expenses and entertainment; viii) by engaging in a business/businesses while in the course of the employment, whether in competition or otherwise with the Company; and ix) divulging or disclosing confidential information and trade secrets of the Company to the competitors of the Company.

By reason of the premises the Company dismissed the Claimant from the employment on 4 January 1992.

When the Claimant's services were terminated the only reason mentioned was his performance. The letter of termination is produced for ease of reference: Mr. Tay Keng Lock 4 January 1992

Re: Termination of Service

I wish to inform you that after our due discussion with your performance in the Company for the year 1991 on 2 January 1992 and 4 January 1992 respectively, I hereby confirm the termination of your service with the Company with effect from today.

Wishing you the best for your future job.

Thank you

Galift (M) Sdn. Bhd. signed ... (Managing Director) Desmond Ong

It can be noted that the reason for terminating the services of the Claimant was after due discussion of the Claimant's performance. It is the submission of the counsel for the Claimant that looking at the disputed paragraphs the Company has now relied on an entirely new ground, citing particulars of misconduct in its Statement in Reply. The learned counsel submitted that in Goon Kwee Phoy v. J.P. Coats (M) Bhd. [1981] 2 MLJ 129, the Federal Court had held that if the Employer had given reasons in its letter of termination, the Employer should confine to those reasons when the case comes to Industrial Court for adjudication. The Employer cannot give another reason at the hearing in the Industrial Court to justify its action to terminate the Claimant's services. It is also wrong the learned counsel contended, for the Industrial Court to look and inquire into the reason for termination given in the Statement in Reply by the Employer because there is no reason or another reason is given to terminate the Claimant's services at the time when the letter of termination is given. The Employer is bound by the reason assigned to the notice of termination.

The second objection of the Claimant is that statutory declaration should not be admitted as evidence. While an Affidavit is permissible by virtue of Rule 21A of the Industrial Court Rules 1967, no provision is made to admit a statutory declaration as evidence. Rule 21A reads:

The President may, if he thinks fit, permit any party to state the evidence of its witness by way of affidavit and/or affidavit-in-reply at least one month before the date of hearing. If such a course of action is taken, the President shall, on an application to be made by the opposite party within fourteen days of service of the affidavit, require the deponent of such affidavit to be present and be examined orally at the hearing.

Therefore the learned counsel submitted paragraphs 4 and 5 and the statutory declaration should be excluded from the hearing.

The Company begins its submission by citing Rule 10(3) of the Industrial Court Rules l967 in its contention paragraphs 4 and 5 of the Statement in reply should not be struck off. Rules 10(3) reads:

Such Statement in Reply shall be confined to the matters raised in the Statement of Case and to any issues which are included in the case referred to the Court by the Minister or in the matter required to be determined by the Court under the provisions of the Act and which may have been omitted from the Statement of Case and shall contain:

i) a statement of all relevant facts and arguments; ...

The Company submits that in paragraph 4 of the Statement of Case the Claimant contends that his dismissal is without any just cause or excuse and in paragraph 5 the averment is that the dismissal is contrary to the principles of natural justice and unfair labour practice. The Company contends that paragraphs 4 and 5 of the Statement in Reply are merely matters raised in reply to the Statement of Case and to issues which are contained in a statement of all relevant facts and arguments. It further submits where a vital issue is not raised in the pleadings it cannot be allowed to be argued and not that when an employer gives a reason in its letter of termination, it is confined to that reason. Moreover paragraph 4 of the Statement in Reply discloses a reasonable cause of defence, that the Claimant was summarily dismissed because of misconduct.

The Company further argues that the word performance is wide enough to connote misconduct and quoted L.B. Curzon's Dictionary of Law in support of its contention. I find it difficult to accept the interpretation that performance by itself connotes misconduct.

In a recent case this Court had dealt with a similar issue in Award 111 of 1992. This very Court then stated that the Company should confine itself to the allegations levelled against the Claimant resulting in his dismissal. It was held in the said Award 111 of 1992 that it is not open to the Company to supplement new allegations against the Claimant before the Industrial Court which did not form the basis of the termination letter. The High Court case in Raman a/l Perumal Thever v. National Land Finance Co-operative Society Ltd. and Industrial Court Malaysia, Usul Pemula No. R8-25-121-1990 (the Society) has sanctioned the above proposition of law when it held that:

The reason for termination or dismissal must be given in the notice of dismissal or termination itself, and if not so given, then the termination or dismissal is without reason.

It is clear in His Lordship's view if no reason is given in the notice of termination, the Industrial Court has no right to enquire into other grounds subsequently put up by the employer to justify the dismissal. However the matter does not end there. The Society in the above Originating Motion was not satisfied with the High Court decision and appealed to the Supreme Court. On 2 November 1992 the Supreme Court allowed the appeal of the Society and overruled the High Court's decision. The law as it stands, after the Supreme Court's decision is that even if no reason or another reason is given in the notice of termination, this Court has the right to enquire into other grounds subsequently put up by the employer to justify the dismissal. This Court is bound by the Society's case and there is no choice but to adopt the ratio decidendi of the Supreme Court.

In view of the decision of the Supreme Court in the Society's case I disallow the Claimant's application to strike off paragraphs 4 and 5 of the Statement in Reply. There is, however, no provision in the Industrial Court Rules to permit any party to state the evidence of its witness by way of a statutory declaration. I, therefore allow the application to exclude the statutory declaration to form part of the record and proceedings of the Court.

The hearing of the case on merits will be fixed by the Registrar in due course.